Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 79-46

* * *

W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

v.

JERRY WAYNE FITCH,
Respondent

* * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

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SUBJECT INDEX

Opinion Below 1

Jurisdiction 2

Question Presented for Review 2

Statute of the United States Involved 2

Statement of the Case 3

Statement of Facts 5

Reasons for Granting the Writ 5

1. The Court of Appeals for the Fifth Circuit by allowing Respondent to pursue his appeal after his untimely filing of a Notice of Appeal and a Motion for Extension of Time filed over 400 days late, rendered a decision in conflict with decisions of other Courts of Appeals on the same matter. 5

2. The Issue Presented Herein Is A Substantial Federal Question Which This Court Should Decide. 9

Conclusion 10

Appendix A - Opinion, Fifth Circuit Court of Appeals (Vance) A-1

Appendix B - Judgment and Order, United States District Court, Western District of Texas, Pecos Division, dated August 20, 1976 (Suttle). B-16

INDEX OF AUTHORITIES

CASE CITATIONS

Alley v. Dodge Hotel, 501 F.2d 880 (D.C. Cir. 1974) 6

Brainerd v. Beal, 498 F.2d 901 (7th Cir. 1974) 7

Browder v. Department of Corrections of Illinois, 98 S.Ct. 556 (1978) 9

Franklin v. Wyrick, 529 F.2d 79 (8th Cir. 1976) 7

Lashley v. Ford Motor Company, 518 F.2d 749 (5th Cir. 1975) 5, 6

Merrill Lynch, Pierce, Fenner & Smith v. Kurtenback, 525 F.2d 1179 (8th Cir. 1976) 6, 7, 8

Pasquale v. Finch, 418 F.2d 627 (1st Cir. 1969) 7

Plant Economy, Inc. v. Mirror Insulation Co., 308 F.2d 275 (3rd Cir. 1962) 8

Reed v. People of the State of Michigan, 398 F.2d 800 (6th Cir. 1968) 6

Salazar v. San Francisco Bay Area Rapid Transit District, 538 F.2d 269 (9th Cir. 1976) 6, 8, 10

Seshachalam v. Creighton University School of Medicine, 545 F.2d 1148 (8th Cir. 1976) 7

Stirling v. Chemical Bank, 511 F.2d 1030 (2nd Cir. 1975) 6

Torockio v. Chamberlain Manufacturing Co., 456 F.2d 1084 (3rd Cir. 1972) 6, 8

STATUTES

28 U.S.C. § 1254(1) 2
28 U.S.C. § 2101(c) 4
28 U.S.C. § 2107 9
28 U.S.C. § 2241 3
28 U.S.C. § 2254 3
Supreme Court Rules, Rule 34(2) 4
Federal Rules of Appellate Procedure, Rule 4 2
Federal Rules of Appellate Procedure, Rule 4(a) ... 2, 3, 6, 7, 8, 9
Federal Rules of Appellate Procedure, Rule 52(b) 9
Federal Rules of Appellate Procedure, Rule 59 9

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v.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

The Petitioner, W. J. Estelle, Jr., Director of the Texas Department of Corrections, respectfully prays that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, for review of their judgment entered January 12, 1979, in the above-entitled cause.

OPINION BELOW

The opinion delivered by the Court of Appeals is reported at 587 F.2d 773 (5th. Cir. 1979); a copy of it is attached to this Petition as Appendix A. The opinion and judgment of the United States District Court for the Western District of Texas (Pecos Division) are unreported; copies of them are attached hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on January 12, 1979, and is dated accordingly. The Petitioner herein filed a timely motion for rehearing; that motion was denied by order of the Court of Appeals on February 12, 1979.

This Court has jurisdiction to grant a writ of certiorari pursuant to the provision of 28 U.S.C. §1254(1).

QUESTION PRESENTED FOR REVIEW

The sole question presented for review herein is:

Whether the district court has the power to sanction the late filing of a notice of appeal within the second 30-day period in the event a Motion for Extension of time as prescribed by Rule 4(a), F.R.A.P., is made *after* the 60-day absolute period for filing any notice of appeal has expired?

STATUTE OF THE UNITED STATES INVOLVED

Rule 4 of the Federal Rules of Appellate Procedure provides in pertinent part:

(A) *Appeals In Civil Cases.* In a civil case. . .in which an appeal is permitted by law as of right from a District Court to a Court of Appeals the notice of appeal required by Rule 3 shall be filed with the clerk with the District Court within thirty days of the day of the entry of the judgment or order appealed from. . .

. . .

Upon a showing of excusable neglect, the District Court may extend the time for filing the Notice of Appeal by any party for a period not to exceed thirty days from the expiration of

the time otherwise prescribed by the subdivision. Such an extension may be granted before or after the time otherwise prescribed by the subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the Court shall deem appropriate.

STATEMENT OF THE CASE

On April 12, 1973, Jerry Wayne Fitch was convicted of the offense of escape from jail and the offense of robbery on his pleas of guilty by a judge in the 112th Judicial District Court of Pecos County, Texas. Punishment was assessed at five years confinement for escaping from jail and twenty-five years confinement for robbery. Direct appeal was not taken to challenge either judgment or sentence. Respondent challenged the convictions collaterally in two state applications for writ of habeas corpus; relief was denied in both cases.

Fitch made application for a writ of habeas corpus to the United States District Court for the Western District of Texas. That court had jurisdiction to entertain his application pursuant to 28 U.S.C. §§2241 and 2254. His application was denied without a hearing on August 23, 1976. On September 23, 1976, petitioner filed his Notice of Appeal, Request for Certificate of Probable Cause, and Motion for Leave to File in Form of Pauperis. All three documents were dated September 23, 1976.

On May 2, 1977, the United States Court of Appeals for the Fifth Circuit granted Fitch a certificate of Probable Cause and he appealed. W. J. Estelle filed a Motion to Dismiss, contending that that court was without jurisdiction to entertain the appeal because Fitch had failed to file a timely Notice of Appeal as required by Rule 4(a) of the Federal Rules of Appellate

Procedure. On October 7, 1977, the Fifth Circuit found that Fitch's Notice of Appeal was not timely but, instead of granting Petitioner's Motion to Dismiss, remanded the case to the District Court to permit Respondent to move for a determination of whether excusable neglect entitled him to an extension of time for filing his notice of appeal. On November 2, 1977, Respondent filed his Motion for Extension of Time to File Notice of Appeal with the District Court and Petitioner filed his reply. On March 27, 1978, the District Court without a hearing concluded from the pleadings that Respondent's untimely notice of appeal was a consequence of excusable neglect and ordered that Respondent's September 23, 1976, Notice of Appeal be deemed timely filed.

After the submission of briefs and oral arguments, on January 12, 1979, the Court of Appeals for the Fifth Circuit vacated the decision of the District Court and remanded the case, holding that the District Court should have held an evidentiary hearing on the issues of whether Respondent's plea of guilty was voluntary and whether he was denied the effective assistance of counsel. The issue of whether the Court had jurisdiction to hear Respondent's appeal, which had been raised by Petitioner in both his brief and oral argument, was ignored completely in the Court's opinion. Petitioner timely filed a Petition for Rehearing, which was denied on February 20, 1979. No date for an evidentiary hearing has as yet been set by the District Court.

Petitioner submitted to this Court on May 11, 1979, an Application for Extension of Time up to and including June 17, 1979 in which to File Petition for Writ of Certiorari, pursuant to 28 U.S.C. §2101(c) and Rule 34(2) of the Supreme Court rules. The application was granted by The Honorable Lewis F. Powell. This Petition for Certiorari follows.

STATEMENT OF FACTS

Because the issue raised in this Petition is a procedural one, all relevant facts are set forth in the Statement of the Case above.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals for the Fifth Circuit, by allowing Respondent to pursue his appeal after his untimely filing of a Notice of Appeal and a Motion for Extension of Time filed over 400 days late, rendered a decision in conflict with decisions of other Courts of Appeals on the same matter.

As previously mentioned, in October of 1977 (well over one year after Respondent's Notice of Appeal should have been filed) a panel of the Court of Appeals for the Fifth Circuit remanded Respondent's case to the District Court for a determination of whether excusable neglect entitled Respondent to an extension of time for filing his Notice of Appeal. The authority relied on by the panel for taking such a step was *Lashley v. Ford Motor Company*, 518 F.2d 749 (5th Cir. 1975). In *Lashley*, the Fifth Circuit was presented with a similar set of circumstances and took exactly the same action: Appellant's Notice of Appeal was received two or three days late; the Court held that it had no jurisdiction over the appeal because the Notice of Appeal had not been timely filed but remanded the case to the District Court "to allow appellant 30 days in which to move for a determination whether under Fed. R. App. 4(a) excusable neglect entitled appellant to an extension of time for filing the Notice of Appeal." *Id.* at 750. By doing so, the Court implicitly held that a Motion for Extension

of Time to File Appeal could be properly filed and ruled upon *after* the sixty-day limit set out in Rule 4 as long as the Notice of Appeal was filed *within* the sixty-day period. Without this implicit holding, the Court could not have taken the action it did.

Petitioner concedes that the Court's action in Respondent's case was consistent with its holding in *Lashley*. Petitioner will also concede that the Court's holding is consistent with the approach taken by other Circuits in similar fact situations. *See, Stirling v. Chemical Bank*, 511 F.2d 1030 (2d Cir. 1975); *Torockio v. Chamberlain Manufacturing Co.*, 456 F.2d 1084 (3rd Cir. 1972); *Reed v. People of the State of Michigan*, 398 F.2d 800 (6th Cir. 1968); *Salazar v. San Francisco Bay Area Rapid Transit District*, 538 F.2d 269 (9th Cir. 1976); *Alley v. Dodge Hotel*, 501 F.2d 880 (D.C.Cir. 1974). However, as Petitioner will shortly point out in detail, at least one Circuit supports the view that there is no jurisdiction in the *Fitch* or *Lashley* fact situation; at least one Circuit has left the question open on similar facts; and in at least two other Circuits, there appears to be conflict on the issue among different panels.

In *Merrill Lynch, Pierce, Fenner & Smith v. Kurtenbach*, 525 F.2d 1179 (8th Cir. 1975) (hereinafter referred to as *Kurtenbach*), an action was brought by the plaintiff to recover a balance allegedly due under a commodity account agreement; the United States District Court for the Northern District of Iowa entered judgment for the plaintiff in an amount less than that allegedly due and plaintiff sought to appeal from such judgment. His notice of appeal was filed within the additional thirty-day period provided in Rule 4 (a) for the filing of an appeal upon a showing of excusable neglect, but he made no showing of excusable neglect in the initial thirty-day period and did not move for a determination as to excusable neglect within the additional thirty-day period. The Court of Appeals for

the Eighth Circuit held that it was without jurisdiction to consider Kurtenbach's appeal because he had failed to comply with the requirements of Rule 4 (a) of the Federal Rules of Appellate Procedure.

Other Circuits have not attacked the practice of allowing a motion for extension of time to file notice of appeal to be filed after the sixty-day period quite as directly as the Eighth Circuit. The Seventh Circuit in *Brainerd v. Beal*, 498 F.2d 901 (1974) held that a notice of appeal filed more than thirty days after the judgment dismissing the complaint was entered was not timely and the Court therefore did not have jurisdiction to entertain the appeal; it did not even consider the possibility of remanding the case to the district court to see whether a finding of excusable neglect for the late filing could be made. In *Pasquale v. Finch*, 418 F.2d 627 (1st Cir. 1969), the Court recognized the practice; however, it decided the case on other grounds and explicitly stated that it was not approving the practice of allowing the Motion to Extend to be filed after a remand from the Court of Appeals. *Id.* at n.1, 418 F.2d at 629.

Further, different panels in the same Circuit disagree as to the approach that should be taken in the *Lashley-Fitch* fact situation. At least one other case in the Eighth Circuit has cited *Kurtenbach* with approval and followed its teachings, *Franklin v. Wyrick*, 529 F.2d 79 (8th Cir. 1976); yet in a third case, while acknowledging the holding of *Kurtenbach*, that same Circuit held that the circumstances of the case necessitated that it be remanded so that the appellant could seek an extension of time within which to file a notice of appeal on the grounds of excusable neglect. *Seshachalam v. Creighton University School of Medicine*, 545 F.2d 1148 (8th Cir. 1976). The same sort of indecisiveness was manifested

by the Ninth Circuit in *Salazar v. San Francisco Bay Area Rapid Transit District, supra,* when it adopted the approach taken by the majority of the Courts of Appeals, but stated nonetheless that they did so "with great reluctance." 538 F.2d at 270.

Petitioner respectfully submits to this Court that the approach taken by the Eighth Circuit in *Kurtenbach,* albeit the minority view, is the correct one and should be adopted by this Court. First, as the Third Circuit stated in *Torockio v. Chamberlain Manufacturing Co., supra.*

> Commentators have suggested that *Plant Economy, Inc. v. Mirror Insulation Co., 308* F.2d 275, 278 (3rd Cir. 1962) prohibits such a result. The Court considering a similar problem arising under Fed.R.Civ.P. 73(a) said:
>
> > The district court was then [87 days after entry of judgment] without power to enter a valid order of extension.
>
> When Fed.R.App.P. 4(a) superseded Fed.R.Civ.P. 73(a) the language of the former rule was changed. The Notes of the Advisory Committee on Appellate Rules, F.R.App.P. 4(a), suggests, however, and commentators have assumed that the difference in language between F.R.Civ.P. 73(a) and F.R.App.P. 4(a) was not intended to affect a change in the above quoted holding of the *Plant Economy* case. *See, e.g.,* 9 J. Moore, Federal Practice ¶ 204.13 (2) (2dEd. 1970).

456 F.2d at 1086. Secondly, as the Eighth Circuit pointed out, to permit a delayed hearing on the excusable neglect issue would not permit orderly and efficient administration of justice by the courts.

2. The Issue Presented Herein Is A Substantial Federal Question Which This Court Should Decide.

This Court in *Browder v. Department of Corrections of Illinois,* 98 S.Ct. 556 (1978), held that the thirty-day limit provided by Rule 4(a) to file notice of appeal applies to federal habeas procedings and is mandatory and jurisdictional. As stated by the Court at page 561:

> Under Rule 4(a) of the Federal Rules of Appellate Procedure, and 28 U.S.C. §2107, a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order and is 'mandatory and jurisdictional' ---. The purpose of the rule is clear: it is 'to set a definite point of time when litigation shall be at an end unless within that time the proscribed application has been made; and if it has not, to advise prospective appellees that they are free of the appellants' demands. Any other construction of the statute would defeat its purpose.
>
> The running of time for filing a notice of appeal may be tolled, according to the terms of Rule 4(a), by a timely motion filed in the district court pursuant to Rule 52(b) or Rule 59. Respondent's motion for a stay and an evidentiary hearing was filed 28 days after the district court's order directing that Petitioner by discharged. It was untimely under the civil rules, . . ., and therefore could not toll the running of time to appeal under Rule 4(a). The Court of Appeals therefore lacked jurisdiction to review the order of October 21.

The issue presented herein is the interpretation of a "mandatory and jurisdictional" rule

which is clearly at variance among Circuits. The Circuits themselves recognize a conflict. *See Salazar v. San Francisco Bay Area Rapid Transit District, supra.* It is an issue which will apparently only be decided with any finality when this Court decides it. The question is one which can be disposed of sumarily by this Court but must be disposed of by only this Court.

CONCLUSION

For the reasons stated above, the Petitioner Estelle prays that this Court grant his Petition for Writ of Certiorari and vacate the judgment of the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

Jerry Wayne FITCH,
Petitioner-Appellant,

v.

W. J. ESTELLE, Jr., Director, Texas Department of Corrections,
Respondent-Appellee.

No. 77-1915.

United States Court of Appeals,
Fifth Circuit.

Jan. 12, 1979.

A petition for writ of habeas corpus was denied by the United States District Court for the Western District of Texas, at Pecos, Dorwin W. Suttle, J., and petitioner appealed. The Court of Appeals, Vance, Circuit Judge, held that: (1) in the face of the peculiarities of the case, the facts involved in the commission of the offense, the not wholly unsubstantiated claim of mental impairment, and the abrupt and largely unexplained change of counsel and defense strategy, a hearing was required on petitioner's claim that his guilty plea was involuntary; (2) a *Pate* hearing on defendant's competency to stand trial was not triggered, where, except to the extent that the commission of crimes may be deemed irrational, defendant revealed no history of irrational behavior, where, though he apparently would not cooperate with his first attorney, he did not show that his demeanor before the court indicated incompetence, and where prior medical opinion tended to negate rather than confirm incompetency; however, because it was necessary to remand the case for a hearing on the plea voluntariness issue, the interest of judicial economy would be best served by requiring that the hearing also encompass the issue of competency to

stand trial, and (3) since the case was to be remanded for a hearing on the voluntariness issue, and since all three issues raised by petitioner were at least to some degree intertwined, it was appropriate that, on remand, an evidentiary hearing also be held on the third issue, viz., the claim that petitioner was denied effective assistance of counsel.

Vacated and remanded.

1. Mental Health - 434

An incompetent defendant can hardly be accepted as a reliable witness to his own competency.

2. Mental Health - 432

Standard of competency to stand trial is whether defendant has sufficient present ability to consult with his attorney with reasonable understanding and whether he has a rational as well as a factual understanding of the proceedings against him.

3. Constitutional Law - 268.2(2)

Trial of an accused while he fails to meet the standard of competency to stand trial denies him due process. U.S.C.A.Const. Amends. 5, 14.

4. Mental Health - 432, 434

A defendant has the right not to be tried while he is incompetent, and he also has the right to procedures adequate to safeguard this substantive right.

5. Criminal Law - 625

An explicitly worded motion for a determination of the accused's competency to stand trial is not the only way to trigger the required procedures.

6. Criminal Law - 625
Habeas Corpus - 113(13)

A *Pate* hearing on defendant's competency to stand trial was not triggered, where, except to the extent that the commission of crimes may be deemed irrational, defendant revealed no history of irrational behavior, where, though he apparently would not cooperate with his first attorney, he did not show that his demeanor before the court indicated incompetency, and where prior medical opinion tended to negate rather than confirm incompetency; however, because it was necessary to remand the case for a hearing on the issue of the voluntariness of defendant's guilty plea, the interest of judicial economy would best be served by requiring that the hearing also encompass the issue of competency to stand trial.

7. Criminal Law - 997.4

A coerced plea is subject to collateral attack.

8. Habeas Corpus - 59

In the face of the peculiarities of the case, the facts involved in the commission of the offense, the not wholly unsubstantiated claim of mental impairment, and the abrupt and largely unexplained change of counsel and defense strategy, a hearing was required on petitioner's claim that his guilty plea was involuntary.

9. Habeas Corpus - 59

Since the case was to be remanded for a hearing on the voluntariness of petitioner's guilty plea, and since all three issues raised by petitioner were at least to some degree intertwined, it was appropriate that, on remand, an evidentiary hearing also be held on the third issue, viz., the claim that petitioner was denied effective assistance of counsel.

Appeal from the United States District Court For the Western District of Texas.

Before GEE and VANCE, Circuit Judges, and HUNTER, District Judge.*

VANCE, Circuit Judge:

Jerry Wayne Fitch, a man of questionable judgment at best, robbed the Sheriff of Pecos County, Texas on January 11, 1973, and at gunpoint escaped from the Pecos County Jail where he had been lawfully confined. In due course he was recaptured, was indicted for robbery, pleaded guilty and on April 12, 1973, he was sentenced to twenty-five years in the State Department of Corrections.[1] No direct appeal was taken.

Fitch's petition for state habeas corpus was denied without a hearing, and the Texas Court of Criminal Appeals affirmed without written order. On December 3, 1975, he filed his federal petition for a writ of habeas corpus, which was denied by the district court on August 23, 1976, without an evidentiary hearing.

Fitch's notice of appeal was filed with the clerk of the district court on September 23, 1976, thirty-one days after entry of the judgment from which appeal was taken. An affidavit filed by Fitch in the district court reflects that he received the district court's order on August 25, 1976, and a receipt for certified mail indicates that he mailed his notice of appeal on September 21, 1976. Citing *Lashley v. Ford Motor Co.*, 518 F.2d 749 (5th Cir. 1975), another panel of this court

*Senior District Judge of the Western District of Louisiana, sitting by designation.

[1]His robbery sentence was ordered to run consecutive with an additional five-year sentence imposed after his conviction for escape. Fitch's petition does not complain of his escape conviction.

remanded the case to the district court for a determination whether excusable neglect entitled Fitch to an extension of time for filing a notice of appeal. *Fitch v. Estelle*, No. 77-1915 (5th Cir. Oct. 7, 1977). On March 27, 1978, the district judge found that petitioner's one-day delay in filing a notice of appeal was the product of excusable neglest and ordered that his appeal be deemed timely filed.

Petitioner contends that the district court erred in failing to conduct an evidentiary hearing on his claims (1) that he was incompetent to stand trial, (2) that his plea of guilty was involuntary, and (3) that he was denied the effective assistance of counsel. He states in his brief that these three issues are inextricably intertwined. We agree, at least in part, but shall address them separately in the order presented.

I.

To deal with Fitch's claimed incompetency at the time of trial we must turn our attention to the recorded events beginning a few weeks before Fitch's conviction in state court.

Because he was an indigent Fitch had requested that an attorney be appointed to defend him against the robbery charge. The trial judge appointed Fitch's first attorney, Mr. Charles Prock, on February 22, 1973. On March 12, 1973, Mr. Prock filed a motion for continuance in connection with which the following exchange took place:

> MR. CHARLES PROCK: Your Honor, this motion for continuance is based upon certain hospitalization records which, yp [sic] to this point we have not been able to obtain. It has come to my attention that the Defendant was hospitalized in the Big Spring State Hospital for some time with a mental disorder.

I think that this may have a bearing, a direct bearing upon our conduct of the trial of the Defendant.

THE COURT: In other words, Mr. Prock, at this point you are telling us and it is your feeling that the Defendant is not mentally competent to assist you in the preparation for the trial. Are you concerned about that?

MR. CHARLES PROCK: That is right, Your Honor. These records may be of some assistance to us when we do go to trial, and we urge the Court to continue this cause to the next term of Court or to a reasonable time in the future.

A discussion ensued between the court, the defense attorney and the district attorney concerning difficulties then being experienced in obtaining reports from the hospital. The district attorney seemed to be faimiliar with the defendant's hospitalization in connection with another case but could not supply the details. After a file was brought to the district attorney he informed the court that the record indicated that Fitch was voluntarily committed in May of 1972. He gave Fitch's attorney a letter addressed to the sheriff and dated July 5, 1972, as well as a discharge form dated July 6, 1972. The form showed that Fitch had been hospitalized for approximately forty-two days. The letter, which was signed by a social case worker, stated that his diagnosis was a personality disorder and that his prognosis was poor. The file also showed that Fitch was hospitalized a second time, which according to the district attorney was for an examination in connection with another offense. A discharge form covering the second hospitalization reflected that Fitch was hospitalized for sixty days beginning on August 3, 1972,

until his discharge on November 2, 1972.[2] The file contained no report whatever concerning Fitch's diagnosis or prognosis on the occasion of the more recent hospitalization. The district attorney stated that the sheriff requested a report but was told verbally that the hospital personnel would not make one and that their diagnosis and prognosis was the same as that shown in the earlier report.

The court then gave the following instruction:

THE COURT: Right. Mr. District Attorney, you are instructed and requested to contact the hospital and ascertain if they feel like they could get us this report and also if they would examine him again if they could and forthwith.

The Court will continue this cause until April 24, 1973, at 10:00 o'clock on such date. Meanwhile the custody of the defendant is remanded to the Pecos County Sheriff's office. We will have the final pre-trial on April 9, 1973. Thank you, Mr. Prock, you are excused.

The record before us is silent as to what, if anything, was done as a result of this instruction and as to whether any subsequent report was ever received by the state court. Fitch alleges that his second attorney told him that nothing was done.

On March 29, 1973, Fitch's appointed counsel filed a motion seeking to discover documents in the possession

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[2]The discharge form that covered the first hospitalization following Fitch's voluntary commitment was addressed to Fitch, himself. The discharge form covering the second hospitalization was addressed to Judge Luttrell, County Judge of Pecos County. From this difference Fitch's counsel would have us infer that Fitch's second commitment was involuntary, the legal requirements for which could be quite significant in connection with our present inquiry. Aside from the difference in addressees, however, we find no evidentiary basis for such an inference.

of the district attorney including "[a]ll medical records or psychiatric reports made in any way in connection with the prosecution of the Defendant." There apparently was never a ruling on the motion.

The record reflects that on April 9, 1973, the judge appointed a second defense counsel to represent the defendant. On April 11, 1973, a motion to withdraw was filed by Mr. Prock, Fitch's first attorney, alleging in support of the motion that Fitch had "failed to co-operate with this attorney to such an extent that this attorney can no longer hope to effectively represent said party." On the next day, April 12, 1973, Fitch, accompanied by his new attorney, appeared in court and pleaded guilty. He and his attorney signed a five-page form captioned "Representations and Waivers of Defendant," used by the court in accepting pleas of guilty. Part of representation number 12 on the standard form that provides "and, have never been treated by a doctor for mental illness or committed to a mental institution" was crossed out. In representation 4(i) he acknowledged that he was informed that he could not be compelled to go to trial for at least ten days following the appointment of counsel. In another portion of the same form he waived this ten-day minimum period.

In reaching his conclusion that a hearing on the issue of competency was not warranted, the district judge relied on (1) the report that resulted from Fitch's first hospitalization from May 25, 1972, to July 6, 1972, and (2) Fitch's acknowledgement in open court at the time his plea was entered that he understood the offense for which he was being tried and felt able to assist his attorney.

[1] We observe at the outset that the second of the stated reasons is of questionable persuasiveness. An

incompetent defendant can hardly be accepted as a reliable witness to his own competency. No principle of waiver applies. As the Supreme Court held in *Pate v. Robinson*, 383 U.S. 375, 384, 86 S.Ct. 836, 841, 15 L.Ed.2d 815 (1966),

> But it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently "waive" his right to have the court determine his capacity to stand trial.

[2-4] The standard long applicable in federal cases and now applied in state cases as well is whether Fitch had sufficient present ability to consult with his attorney with reasonable understanding and whether he had a rational as well as a factual understanding of the proceedings against him. *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960); *Davis v. Alabama*, 545 F.2d 460, 463 (5th Cir.), *cert. denied*, 431 U.S. 957, 97 S.Ct. 2682, 53 L.Ed.2d 275 (1977); *Lee v. Alabama*, 406 F.2d 466, 471, (5th Cir. 1968), *cert. denied*, 395 U.S. 927, 89 S.Ct. 1787, 23 L.Ed.2d 246 (1969). Trial of an accused while he fails to meet this standard of competency denies him due process of law. A defendant has a right not to be tried while he is incompetent, and he also has a right to procedures adequate to safeguard this substantive right. *Martin v. Estelle*, 546 F.2d 177 (5th Cir.), *cert. denied*, 431 U.S. 971, 97 S.Ct. 2935, 53 L.Ed.2d 1069 (1977); *Davis v. Alabama*, *supra*; *Grissom v. Wainwright*, 494 F.2d 30 (5th Cir. 1974); *Nathaniel v. Estelle*, 493 F.2d 794 (5th Cir. 1974).

[5] Fitch now claims that his right to procedural due process was violated when the state trial court failed to conduct a hearing to determine his competency at the time of trial. He did not raise the issue of competency at that time either by evidence or by motion. The only relevant proceedings that appear from the fragments of record before us took place in connection with the

motion for continuance. *Pate v. Robinson, supra,* makes clear, however, that an explicitly worded motion is not the only way to trigger the required procedures.

> [I]f the defendant has presented evidence to the trial court, before or during trial, that raises a "bona fide doubt," of his competence . . . the trial court's failure to make further inquiry denies that defendant his constitutional right to a fair trial.

Davis v. Alabama, supra, 545 F.2d at 464.

[6] The events recited above tell the complete story that is before us. Defendant has not shown that the factors of significance outlined in *Drope v. Missouri,* 420 U.S. 162, 180, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975) were present. Except to the extent that the commission of crimes may be deemed irrational, defendant revealed no history of irrational behavior. Although Fitch apparently would not cooperate with his first attorney, he does not show that his demeanor while before the court indicated incompetency. Finally, the prior medical opinion tends to negate rather than confirm incompetency. We conclude from what Fitch has presented in the district court and in this court that a *Pate* hearing was not triggered. *See Grissom v. Wainwright,* 494 F.2d 30 (5th Cir. 1974). We would so hold if the issue were standing alone. Because we find it necessary to remand the case for a hearing on the second issue, however, we conclude that the interests of judicial economy will best be served if we require that the hearing encompass this issue as well. In this connection the initial question before the district court will be whether reasonable grounds were presented to the trial court in 1973 to entitle Fitch to a full sanity hearing. *See Lokos v. Capps,* 569 F.2d 1362 (5th Cir. 1978). If that question is resolved affirmatively, the district court should further determine whether a meaningful

hearing on that issue may now be held[3] and, if so, it must decide the ultimate issue, whether Fitch was competent at the time of his trial.[4]

II.

The second issue is the claimed involuntariness of Fitch's plea of guilty. Fitch bases his contention on a claimed combination of threats and promises by his jailer and his newly appointed second defense counsel. Relevant portions of the sworn allegations in his petition are set out below.[5]

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[3]We do not forecast that if it is reached the problem will be as unsuited for contemporary resolution as it was in *Pate.* Fitch was evaluated twice at a state institution which presumably maintains records that may or may not free the question of substantial doubt. The question is for the district court to decide. We simply observe that the question is sometimes not as insoluble as the *Pate* court found it to be under the facts then presented. *See, e. g., Lee v. Alabama, supra* at 471.

[4]If not, of course, a new trial must be ordered. *Pate v. Robinson, supra.*

[5]Being returned to the Jail [on April 11, 1973], Petitioner was called from the cell block late in the p. m. hours and led to an office within the building. Petitioner was there confronted by a deputy sheriff jailer and, after extensive coercive isolated interrogation, told that, if he failed to co-operate as instructed, he would be sorry for his actions. The interrogation processes continued throughout the entire night, with emphasis placed on one alleged offense of jailbreak which was at that time pending against the Petitioner. During the early a. m. hours while being interrogated by the officer, Petitioner was instructed that he was to plead guilty to any and all charges brought against him and promised the Petitioner that immediately after the guilty pleas were entered, a recommendation would be submitted before the Court for the Petitioner to be placed under the care of an institution for the mentally ill where he would be treated fairly and taken care of, and that, if the Petitioner did as he was told, the burglary charge would be reversed by the Court and dismissed; and further, that the Petitioner would never see the inside of the State Penitentiary.

No hearing has been held by either the state courts or the district court on this claim of coercion. The district

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Petitioner was then threatened that he could either accept the *deal* or spend the rest of his life behind bars and that once he returned from Court and it was learned that he did not follow through, the Petitioner would never escape from any other jail as long as he lived and that he would never forget escaping from jail after all was finished; and further, that the Petitioner would be lucky if he in fact reached the front doors of the State penitentiary. Petitioner, being shocked by the officer's threatening remarks and statements, was placed back in the cell block and told to think about what was said.

On the next morning, April 12, 1973, the petitioner appeared before the Honorable Charles Sherill, presiding Judge of the 112th Criminal Judicial District Court of Pecos County, Texas, whereupon the Court appointed new counsel (Ralph O. Burleson) to represent the Petitioner. Petitioner and the newly appointed attorney then retired for confrontation and consultation. After having related to the attorney all that had occurred the night before, up until a few hours before appearing in Court that day, Petitioner acknowledged that he was 'Not Guilty' of the offenses brought against him. He desperately pleaded with his counsel to first get him transfered [sic] to another jail where he would be safe from the threat of the officers and thereafter to assist him in the preparation of his defense. The attorney related to Petitioner that nothing could be done for him and that it was a hopeless matter. Counsel then instructed the Petitioner to plead guilty. The Petitioner attempted to explain to the attorney that he could produce available, material, and relevant evidence and witnesses that could possibly establish a defense and then inquired as to the psychiatric examination and records. Counsel instructed and informed the Petitioner that nothing had been done to secure the records and further instructed the [sic] he could either plead guilty to the alleged offense or suffer the consequences of life behind bars. Counsel then stated that, if the Petitioner pled guilty to all of the charges, he would immediately be placed in a hospital where he would receive psychiatric attention; that the escape would be run concurrent with the robbery and burglary charges; that he had spoken with the Judge and was assured that after the pleas of guilty were secured, the burglary charge would be reversed and dismissed and that the Court would order him committed to the State Hospital at Big Springs; and further, that the petitioner would never reach the penitentiary. The court-appointed attorney

judge looked to petitioner's contrary acknowledgements at the time of his plea and determined that further inquiry was not justified.

[7] The state court used a very detailed written and oral inquiry before accepting Fitch's plea. Why shouldn't the state of Texas be entitled to rely on Fitch's own declarations made in open court with counsel at his side? We must accept as our starting point that a coerced plea is subject to collateral attack. *Fontaine v. United States*, 411 U.S. 213, 93 S.Ct. 1461, 36 L.Ed.2d 169 (1973). No system, including that utilized in Fitch's case, can be perfected to a point that makes it "uniformly invulnerable to subsequent challenge." *Id.* at 215, 93 S.Ct. at 1462. We have recognized that when the state court has failed to do so and unless it appears from the petition that the petitioner is not entitled to relief, the district court must hold an evidentiary hearing and find the relevant facts. *Scott v. Estelle*, 567 F.2d 632 (5th Cir. 1978).

In *Blackledge v. Allison*, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 736 (1977), the Supreme Court noted that prisoners usually have everything to gain and nothing to lose by a collateral attack. Most prisoners want to be released from prison. If they fail in their attack they may at least win a trip outside the walls to a distant city where the hearing is held. Obviously the potential for abuse is enormous. But against this must be weighed the historic role of the great writ in the preservation of human freedom:

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then informed Petitioner that if he persisted in pleading 'Not Guilty', he would surely spend the rest of his life in the penitentiary and that nothing could or would be done for him. Petitioner then submitted to the attorney's instructions and thereafter appeared before the Court where the attorney announced ready for trial.

> And a prisoner in custody after pleading guilty, no less than one tried and convicted by a jury, is entitled to avail himself of the writ in challenging the constitutionality of his custody.

Id. at 72, 97 S.Ct. at 1628.

[8] In the wake of *Blackledge*, however, a formidable barrier to collateral attack of a guilty plea remains:

> Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible.

Id. at 74, 97 S.Ct. at 1629. The allegations in this case are not conclusory. They include what was said when, where, and by whom. In the face of the peculiarities of this case, the facts involved in the commission of the offense, the not wholly unsubstantiated claim of mental impairment and the abrupt and largely unexplained change of counsel and defense strategy, the barrier was clearly overcome, and a hearing was required.

III.

Petitioner's claim that he was denied the effective assistance of counsel is based on (1) promises that he alleges were made by his second appointed counsel to induce his guilty plea and (2) the attorney's failure to investigate whether Fitch was competent.

[9] We need not consider whether these allegations standing alone were sufficient to require a hearing on this issue by the district court. The case must be remanded for a hearing on the voluntariness of Fitch's plea of guilty. All three issues are at least to some degree intertwined. We therefore direct that on remand an evidentiary hearing also be held on this third issue.

The order of the district court dismissing petitioner's application for habeas corpus relief is vacated and the case remanded for an evidentiary hearing in the district court in accordance with this opinion.

VACATED and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
PECOS DIVISION

JERRY WAYNE FITCH	)(	
	)(	
VS.	)(	P-75-CA-37
	)(	
W.J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS	)(	

JUDGMENT

This action came on for consideration before the Court, Honorable D. W. Suttle, United States District Judge, and the issues having been duly considered and the Court having rendered a decision on August 20, 1976, granting respondent's motion to dismiss; it is, therefore,

ORDERED and ADJUDGED that respondent's motion to dismiss is granted and this case is terminated.

DATED at Midland, Texas this the 23rd day of August, 1976.

DAN W. BENEDICT, CLERK
UNITED STATES DISTRICT
COURT

By: s/s
Deputy U.S. District Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

JERRY WAYNE FITCH	)	
	)	
VS.	)	P-75-CA-37
	)	
W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS	)	

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

On April 12, 1973, the Petitioner, Jerry Wayne Fitch, was convicted upon his plea of "guilty" in the 112th District Court of Pecos County, Texas, of the felony offense of robbery in cause No. 953, and of the felony offense of jail break in cause No. 946. The Petitioner was sentenced to a total of thirty years in the custody of the Texas Department of Corrections. Petitioner apparently did not appeal either of these convictions.

Subsequently, Petitioner filed a Petition for Writ of Habeas Corpus in the State trial court, complaining of his convictions in causes numbers 946 and 953. On July 28, 1975, the trial court considered and rejected the Petitioner's application for habeas corpus relief. On September 23, 1975, the Petitioner's application was also rejected by the Texas Court of Criminal Appeals without written order, based on the findings of the trial court. Petitioner filed the present application for federal habeas corpus relief on December 3, 1975.

After reviewing the file in the present case, together with the record of Petitioner's State court proceedings, this Court finds that the Petitioner has satisfied the exhaustion requirements of 28 U.S.C. § 2254(b).

In the present Petition for federal habeas corpus relief, which was filed on December 3, 1975, and exceeds fifty typewritten pages in length, the Court believes that Petitioner has raised the following issues:

(1) That the trial court failed to hold a hearing to determine Petitioner's competency prior to accepting his guilty plea in causes numbered 946 and 953.

(2) That the trial court did not advise the Petitioner concerning the consequences of his plea of guilty.

(3) That his plea of guilty was not voluntarily and intelligently made, but was the product of coercion and duress.

(4) That he was denied effective assistance of counsel.

(5) That he was denied the right to appeal.

Petitioner's first alleged ground of error, that the trial court failed to hold a hearing to determine the Petitioner's competency prior to accepting his guilty plea, is without merit. Upon Motion of Petitioner's counsel, the Court granted a continuance in the case to allow Petitioner's counsel to investigate Petitioner's allegation that he had been hospitalized for some mental disorder in the Big Spring State Hospital in 1972. A letter from the Big Spring State Hospital found in the Statement of Facts of Petitioner's guilty plea proceeding, indicates that Petitioner was first admitted to Big Spring State Hospital on May 25, 1972, on a voluntary commitment and was released on July 6, 1972. The record further indicates that during his commitment Petitioner was not incompetent, but rather had an average I.Q. and sufferred from no emotional problems or disorders that would interfere with his intellectual functioning. This Court also finds from the record that prior to accepting the guilty plea, the State

trial court inquired of the Petitioner as to his competency, and the Petitioner, in open Court, acknowledged that he understood the offense for which he was being tried and that he felt he was able to assist his attorney. See Transcript of State Court Proceedings No. 946 and No. 953, filed as document No. 6 in this record on January 5, 1976; and *Drope v. Missouri*, 95 S.Ct. 896 (1975).

Petitioner's second ground of error, that the trial court did not admonish him in regard to the consequences of a plea of guilty to the offenses charged, does not rise to a Constitutional level reviewable by federal habeas corpus. As Respondent points out in his Motion to Dismiss and Answer, "alleged violations of State law and procedure are not properly reviewable in a collateral federal habeas corpus proceeding unless such also constitutes a denial of federal Constitutional rights." See *Donnelly v. DeChistoforo*, 94 S.Ct. 864 (1974) and others. Although Petitioner's second ground of error clearly does not rise to the level of a Constitutional denial, the Court finds upon reviewing the record that Petitioner was admonished of the consequences of a plea of guilty to the offenses charged prior to the entry of his plea, and prior to the waiver of his Constitutional right.

Petitioner's third ground of error, that his plea of guilty was not voluntarily or intelligently made, appears to imply some sort of conspiracy between his Court appointed attorney, the prosecutor, and the trial Judge. Petitioner alleges that his plea of guilty was the product of coercion and duress applied upon him by the three aforementioned individuals. The record, however, does not bear the Petitioner out on this issue either. The record reflects that Petitioner's plea of guilty was made voluntarily and knowingly, and with assistance of counsel. The record demonstrates that Petitioner acknowledged to the trial court that his plea of guilty

was made because he was in fact guilty and not because of any force or coercion. Since a plea of guilty waives all nonjurisdictional issues, or grounds of error alleged to have occurred prior to the entry of such a plea, this Court finds that a further investigation of Petitioner's third ground of error is not warranted. See *Tollett v. Henderson*, 411 U.S. 258 (1973), and others.

Petitioner's fourth ground of error, that he was denied effective assistance of counsel, is also without factual support. The record indicates that Petitioner's counsel rendered effective assistance within the guidelines set by the United States Court of Appeals for the Fifth Circuit. See *Fitzgerald v. Estelle*, 505 F.2d 1334 (5th Cir. 1975), and others.

Petitioner's final alleged ground of error, that he was denied the right to appeal, is also without merit. The record of Petitioner's State Court conviction shows that Petitioner was advised by the trial court of his right to appeal without cost. Since Petitioner does not claim that he made any State official aware of his alleged desire to appeal, nor has he demonstrated that he has any valid points that he could have successfully raised on appeal, the Court finds that Petitioner's final alleged ground of error presents no substantial Constitutional question. See *Patterson v. Estelle*, 494 F.2d 37 (5th Cir. 1974), and others.

Therefore, the reasons and authorities cited above, the Court finds that Petitioner's application for federal habeas corpus relief should be, and the same is hereby, DENIED. Respondent's Motion to Dismiss is GRANTED.

SO ORDERED this the 20th day of August, 1976.

s/s
UNITED STATES DISTRICT JUDGE